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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Report of the Working Group

Chairman-Rapporteur: Mr. Carlos CALERO-RODRIGUES (Brazil)

INTRODUCTION

1. By its decision 47/414 of 25 November 1992, the General Assembly, after taking note of the report of the Working Group established under its resolution 46/55 of 9 December 1991 (A/C.6/47/L.10), decided to re-establish the Working Group at its forty-eighth session, in the framework of the Sixth Committee, to continue consideration of the following issues in order to facilitate the successful conclusion of a convention through the promotion of general agreement:

"(i) Issues of substance arising out of the draft articles on jurisdictional immunities of States and their property, adopted by the International Law Commission at its forty-third session; 1/

"(ii) The question of convening an international conference, to be held in 1994, or subsequently, to conclude a convention on jurisdictional immunities of States and their property".

2. Further to the above decision of the General Assembly, the Sixth Committee, at its 2nd meeting of the current session, held on 24 September 1993, re-elected Mr. Carlos Calero-Rodrigues (Brazil) Chairman of the Working Group.

3. The Working Group held 13 meetings, between 27 September and 8 October 1993, and a final meeting on 11 November to consider and adopt its report.

4. The Working Group had before it, in addition to the draft articles adopted by the International Law Commission at its forty-third session, the written

comments and observations by 22 States on the draft articles (A/47/326 and Add.1-5, A/48/313, A/48/464 and A/C.6/48/3), the report of the Working Group adopted at the previous session (A/C.6/47/L.10), as well as various informal papers and suggestions.

I. GENERAL DESCRIPTION OF THE WORK CARRIED OUT BY THE WORKING GROUP

5. In accordance with its mandate, the Working Group considered, first, issues of substance arising out of the draft articles, and second, the question of convening an international conference to conclude a convention on the subject.

6. As regards the first aspect, the Working Group discussed the main issues concerning the draft articles, which were identified by the Chairman as follows: first, the definition of the term "State" and of the term "commercial transaction" (article 2, paragraph 1), including the question of the criterion to be applied in determining whether a contract or transaction is a "commercial transaction" (article 2, paragraph 2); second, the question of the legal distinction between a State and certain of its entities in the matter of State immunity from foreign jurisdiction (a question which the International Law Commission (ILC) had dealt with in article 10, paragraph 3, of its draft, and which the Working Group addressed mostly in the framework of article 5); third, the exception of "contracts of employment"; and fourth, the question of immunity from measures of constraint in connection with proceedings before a court. Other issues which were raised in the course of the debate concerned article 4, entitled "Retroactivity of the present articles", and the possible inclusion of provisions on aircraft and space objects and on the settlement of disputes.

7. The views expressed and the stage reached in the consideration of the issues referred to above are reflected in section II below. The proposals made in the course of the debate are reproduced in full in the annex to the present report.

8. It was the general feeling at the conclusion of the proceedings that the exchange of views in the Working Group had contributed to the clarification of positions and that progress had been made on a number of substantive issues. While a view was expressed that the draft articles as adopted by the International Law Commission struck on the whole an adequate balance between the various positions, the prevailing opinion was that areas of disagreement remained which should be further narrowed down in order to arrive at a generally acceptable basis for the elaboration of a convention.

9. There was widespread agreement that consultations should continue in a less formal framework than that of the Working Group.

10. Some delegations suggested that the General Assembly should already, at the current session, decide to convene an international conference for the elaboration of a convention, without, however, setting any specific date at this stage. The remark was made that such a decision of principle would prompt Governments to actively seek further possibilities of compromise and that delegations had sufficient elements of information in their hands to determine whether a conference could be held successfully. Indefinitely postponing a

decision on the matter would, it was stated, be detrimental to the codification efforts of the ILC.

11. Some other delegations, while favouring the idea of convening a conference in the light of the rapprochement evidenced by the proceedings of the Working Group, felt that it was too early to take a formal decision on the matter. They warned against hasty action lest the conference be convened on a less than sound basis and end up in failure or in a convention that would not be generally acceptable and would therefore remain largely unratified.

12. Still other delegations said that the measure of progress achieved so far did not yet enable them to answer the question whether a generally acceptable convention could be arrived at and whether there were sufficient guarantees for a conference to be successful. They therefore could not commit themselves to the idea of a conference, particularly as a failed conference or an unratified convention would have adverse effects on the state of the law in the area under consideration.

13. The Chairman suggested a draft decision on the future programme of work on the item which, in his view, could be generally acceptable to the Working Group (subsequently circulated as document A/C.6/48/L.5). The draft decision met with the approval of the Working Group subject to the inclusion therein of a specific indication of the timing of the consultations to be held at the forty-ninth session of the General Assembly.

II. VIEWS EXPRESSED AND STAGE REACHED IN THE CONSIDERATION OF THE ISSUES REFERRED TO IN PARAGRAPH 6 ABOVE

Article 2. Use of terms

Paragraph 1

Subparagraph (a) (the term "court")

14. There were no comments on the subparagraph.

Subparagraph (b) (the term "State")

15. The Chairman suggested rearranging the order of subparagraphs (b) (i) to (v) so as to deal successively with functional units, territorial units and individuals. Some doubts were expressed on this suggestion.

Subparagraph (b) (i)

16. There were no comments on the subparagraph.

Subparagraph (b) (ii)

17. There was a proposal (see annex, proposal A) to broaden the scope of subparagraph (ii) by including therein the constituent units of a State (and not only, as does the ILC text, the constituent units of a federal State). In support of this proposal, attention was drawn to the potential dual capacity of

constituent units to exercise governmental authority on behalf of the State or on their own behalf, pursuant to the distribution of public powers under national law. On the other hand, the question was raised whether the local or regional subdivisions of a State could be considered as subjects of international law to the same extent as constituent units of a federal State. It was pointed out that situations in which a constituent unit exercised governmental authority for the State or pursuant to the delegated powers of the State would be covered by subparagraph (iii) of the ILC text, other situations involving the exercise of local or regional governmental authority falling within the realm of domestic law rather than international law. Some members suggested that the situation of units with separate legal personality could, like that of State enterprises, be covered in a separate provision rather than in the framework of the definition of the State.

18. The discussion otherwise focused on the appropriateness of including a specific provision on the constituent units of a federal State and on the relationship between such a provision and subparagraph (iii) (political subdivisions of the State). The remark was made that in most cases the constituent units of a federal State performed acts in the exercise of the governmental authority of the State and would be covered by subparagraph (iii), and that subparagraph (ii) would only take care of the limited cases where they acted on their own behalf.

19. In the light of these remarks, the Chairman reformulated the proposal he had made at the previous session (A/C.6/47/L.10, para. 9) as follows:

> "constituent units of a federal State <u>in cases</u> not covered by subparagraph (iii), provided that the federal State <u>has submitted</u> to the depositary of the present instrument a declaration signifying that they <u>are</u> entitled to invoke the immunity of the State;"

Some members considered that this wording clarified the ILC text and would simplify its application by courts. Others pointed out that the constitutional regimes of federal States varied greatly, and questioned the appropriateness of a separate provision on the matter.

20. Concern was furthermore expressed that the requirement of a declaration would impose an undue burden on States. The Chairman, on the other hand, observed that the concerns underlying the proposal referred to in paragraph 17 above could be taken care of by extending the scope of his proposal to constituent units of a State in general and requiring the declaration for all such units.

<u>Subparagraphs (b) (iii) and (iv)</u>

21. A number of representatives felt that the phrase "sovereign authority of the State", used both in subparagraph (b) (iii) and in subparagraph (b) (iv), was unclear. It was noted that in the corresponding French phrase, the word "sovereign" did not appear.

22. The Working Group agreed that the phrase "governmental authority", used, for instance, by the ILC in article 7 of Part One of its draft on State responsibility, would adequately describe the authority to exercise functions of

a governmental nature which individuals were not empowered to exercise, including administration, regulatory or law enforcement functions. The remark was however made that, for languages other than English, a literal translation of this phrase would restrict its scope. It was therefore agreed to retain the wording adopted by the ILC for those other languages.

23. The question whether the words "of the State" should be retained after "governmental authority" was answered in the negative by some delegations, on the ground that governmental authority necessarily derived from the State, and in the affirmative by other delegations, which found it necessary to make it clear that a political subdivision exercising its own governmental authority at the local or regional level did not fall under the definition of the State for the purposes of the present draft articles.

24. Some delegations felt that the word "political" should be replaced by "territorial". This amendment was viewed as unnecessary by some delegations, which were of the view that a territorial basis was implicit in the notion of political subdivision, and as potentially harmful by others.

25. A proposal was suggested by one delegation in order to address what it saw as the procedural problems in adopting an approach to agencies or instrumentalities of the State and other entities which consider them as the State in certain defined circumstances. That proposal (see annex, proposal K) consisted in replacing paragraph 1 (b) (iv) of article 2 by a new article which would (a) exclude from the definition of the term "State" separate legal entities of a State (other than a State's central bank) which have distinct legal personality, and (b) provide that such entities enjoy immunity only when they perform acts in the exercise of the sovereign authority of the State and the circumstances are such that the State would have been so immune.

26. This approach gave rise to doubts on the part of several delegations. They observed that: (a) it did not fit into the logic of the draft articles, which were intended to deal with State immunity and not with the possible immunity of other entities; (b) it paradoxically admitted that entities characterized as distinct from the State might exercise the sovereign authority of the State; (c) it was not consistent with the approach adopted in paragraph 1 (b) (iii) of article 2; (d) it relied on the confusing notion of "separate legal entities" which blurred the distinction between agencies and instrumentalities of the State and State enterprises.

27. Some delegations, on the other hand, found merit in the proposal under consideration which, it was stated, brought clarity to the content of paragraph 1 (b) (iv) of article 2.

28. The proposal included a paragraph 3 which provided that if a separate entity submitted to the jurisdiction of the courts of another State in proceedings in respect of which it was entitled to immunity, articles 18 and 19 should apply in respect of those proceedings.

29. The remark was made in this connection that certain aspects of articles 18 and 19, such as the references to property of a military character or property used for the purposes of a diplomatic mission, were hardly applicable to proceedings involving an entity which was excluded from the definition of the

term "State". It was indicated in reply that the same criticism could be addressed to paragraph 1 (b) (iv) of article 2, as adopted by the ILC.

30. The discussion otherwise focused on the functional criterion in both subparagraphs requiring that the corresponding entities be entitled to act in the exercise of governmental authority. In this connection, an approach was proposed whereby (a) this requirement would be eliminated from subparagraphs (iii) and (iv); (b) a definition of either "State enterprise" or "governmental agency" would be provided for the purpose of differentiating between the two types of entities; and (c) the special case of a State enterprise or State entity other than a governmental agency authorized to perform acts in the exercise of governmental authority would be dealt with in a separate provision to be included in article 5 (see annex, proposal B).

31. The Working Group also had before it, as far as subparagraph (iv) is concerned, a proposal made by the Chairman at the previous session (ibid., para. 11), which sought to replace the words "to the extent that they are entitled to perform acts" by the words "whenever performing acts". Some members felt that the proposed text clarified the distinction between political subdivisions and agencies or instrumentalities. Others expressed concern that the inclusion of an actual performance criterion would require the courts to make an additional factual determination at an early stage of the proceedings. Attention was also drawn to the possibility that an agency or instrumentality might de facto perform acts in the exercise of governmental authority of the State without being entitled to do so.

32. In the light of the discussion, the Chairman reformulated his proposal as follows:

> "agencies or instrumentalities of the State and other entities <u>entitled to perform</u> acts in the exercise of the governmental authority of the State, <u>whenever performing such acts</u>;"

Some delegations noted that the phrase "other entities" was used with a different meaning in other articles and suggested that it be deleted from subparagraph (iv) to avoid uncertainty and confusion.

<u>Subparagraph (c)</u>

33. The debate focused on the reformulation proposed by the Chairman at the previous session (ibid., para. 13). Some supported it as more logical and less tainted with circularity. Others found the ILC text clearer.

34. Some delegations suggested the deletion of the phrase "otherwise than in the exercise of the sovereign authority of the State", which, it was stated, had the effect of introducing the purpose test into the definition of the term "commercial transaction" and would create problems of interpretation for domestic courts. Other delegations insisted on the retention of the phrase in order to provide for those contracts which, although of a commercial nature, were concluded to further objectives connected with public functions of States and should as such benefit from immunity. This issue was generally recognized as closely connected to paragraph 2 of article 2.

35. In the light of the debate, the Chairman reformulated his proposal as follows:

"(c) 'commercial transaction' means:

(i) any contract or transaction of a commercial, industrial or professional nature into which a State enters or in which it engages, including a contract or transaction for the sale of goods or supply of services, but not including a contract of employment of persons;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction."

The proposal met with a wide measure of support.

Paragraph 2

36. As indicated in last year's report (ibid., para. 16), the two alternatives proposed by the Chairman for paragraph 2 (ibid., para. 15) were intended to facilitate a compromise on the divisive issue of whether only the nature or also the purpose of a transaction should determine its commercial character. The first alternative would leave the determination of the non-commercial character of a transaction entirely to the parties' agreement; the second would restrict the application of the purpose test to cases where the State party to the transaction had expressly reserved that possibility.

37. The Working Group also had before it a proposal of the Special Rapporteur of the International Law Commission for the topic (ibid., para. 18), which upheld the primacy of the "nature" test but provided for the possibility of exceptions in circumstances where the contract or transaction was made for the purpose of humanitarian assistance.

38. At the initial phase of the discussion, some members took the view that the compromise text adopted by the International Law Commission offered the best solution to the problem. As regards the alternative texts proposed by the Chairman, the first was supported by some representatives, who however insisted that it be preceded by an affirmation of the primacy of the nature test (see annex, proposal C). The second met with a measure of support, subject to the replacement of the words "has expressly reserved that possibility" by "meant to reserve that possibility". Some representatives suggested combining the two alternatives and including in the second one an additional requirement, namely that the other party should not have expressly objected (see annex, proposal D). As for the proposal referred to in paragraph 37 above, it was supported by some members but viewed by others as restrictive to the point of depriving the purpose test of any real role.

39. At a second stage of the proceedings, the Chairman proposed a text (see annex, proposal E), which met with a measure of support but gave rise to reservations on opposite grounds: some delegations felt that it did not clearly bring out the primacy of the nature test. Others viewed it as unduly restricting the application of the purpose test by making it conditional upon the agreement of the parties. In this connection, the remark was made that

because they discharged public responsibilities, States could not be equated with private parties even when entering into contracts ostensibly of a private law nature and that in determining the character of such transactions their purpose as well as their nature had to be taken into consideration. Two alternative proposals reflecting this position were submitted to the Working Group (see annex, proposal F).

40. At a third stage of the debate, and on the basis of informal proposals (see annex, proposals G and H), a text which sought to accommodate the various concerns reflected above was submitted to the Working Group (see annex, proposal I). That text provided in a first subparagraph that in determining whether a transaction was a "commercial transaction", reference should be made to the nature of the transaction. It did so, however, subject to three exceptions, namely (i) express prior agreement between the parties on the character of the transaction; (ii) express prior agreement between the parties that the court would, in determining the character of the transaction, take its purpose into account; and (iii) obligation for the court, irrespective of any choice-of-law clause, to take into account the purpose of the transaction if it was "a relevant criterion under the law of the country which was most closely connected with the transaction". As regards the last of these three exceptions, it was explained that:

(a) The term "law" encompassed legislation and case-law and other forms of practice;

(b) The elements that would enable the court to identify the country most closely connected with the contract included the place where the negotiations were conducted, the place of conclusion of the contract, the currency chosen, the place of performance, etc.;

(c) The proposed formula took account of the fact that, in practice, the parties to a contract, in selecting the law applicable to the transaction, tended to opt for the most developed legal systems, which were likely to give preference to the nature test.

41. Some delegations found it difficult to accept the proposed text. Criticisms focused on:

(a) The lack of clarity of the phrase "the law of the country which is most closely connected with the contract or transaction" and the problems which were likely to arise in applying the criterion of the link between a transaction and a legal order, particularly as a transaction might be closely connected to several legal orders;

(b) The difficulties which courts would face in acquainting themselves with the legislation of another State and making the numerous determinations required, involving a risk of protracting proceedings which were already very complex;

(c) The inconsistency of recognizing, in two subparagraphs, that the applicability of the purpose criterion would depend on the agreement of the parties and, in another subparagraph, that the purpose criterion would apply irrespective of the will of the parties as manifested in a choice of law clause;

(d) The danger that courts might, in accordance with the choice-of-law rules applicable in the country concerned, find it impossible to apply the law of another country on the ground of incompatibility with public policy.

42. Other delegations observed that the proposed text represented a major concession on the part of the States favouring the purpose criterion since it would in practice leave a very limited field of application to the said criterion, even though, in their opinion, that test was no more objective and provided no more certainty than the purpose test. The remark was also made that courts were routinely called upon to determine the law applicable to a contract and had, in many legal systems, to identify the law most closely connected with the contract by relying on a number of well-known objective factors; the law thus identified would, it was stated, provide the answer to the question whether the purpose of the contract had to be taken into consideration. The point was also made that there was no inconsistency in, on the one hand, leaving it to the parties to decide on the role to be played by the purpose criterion in determining the character of the transaction and, on the other hand, laying down the rule to be applied in case the parties had kept silent on the matter.

43. While some delegations expressed surprise at the objections raised against a proposal which left it to the courts to determine whether the purpose of the transaction should be taken into account, others observed that the application of the purpose test might result in uncertainty for private parties and in all the transactions engaged in by a State being considered as non-commercial and that specific limits therefore had to be set to the application by the courts of the said test.

44. At the concluding stage of the debate on paragraph 2 of article 2, the Chairman proposed a reformulation (see annex, proposal J) of the last of the exceptions referred to in paragraph 40 above. More specifically, he suggested providing that the court would be under an obligation to take into account the purpose of the transaction if: (a) the purpose was a relevant criterion under the law of the State which was a party to the contract or transaction (the term "law" being given the broad meaning referred to in paragraph 40 (a) above); and (b) the other party was informed of that circumstance before the conclusion of the contract.

45. The first of the above conditions met with a large measure of support. The second gave rise to divergences of views on the nature and extent of the obligation placed on the State party to the transaction.

46. Some members interpreted the requirement in question as implying an active obligation of the State to furnish the relevant information directly to the other party at the time of negotiating or concluding that transaction. They accordingly suggested either replacing the words "was informed" by "was notified in writing", or requiring the inclusion in the contract of a clause stipulating the relevance of the purpose criterion.

47. Other members warned against placing an unfair burden on the State party to a transaction. They pointed out that the purpose criterion was provided for under their national legislation and that there was no reason to give it a subordinate role or to subject its application to unduly restrictive conditions. Some of them expressed readiness to go along with the Chairman's latest

proposal, provided it was understood that the obligation of information could be discharged through the publication of the relevant legislation and case-law. In the same spirit, the suggestion was made: (a) to replace "was informed" by "was aware"; (b) to allow for the application of the purpose test wherever the State deemed it possible for the other party to be aware of the relevant legislation or practice; and (c) to enable States at the time of becoming parties to the convention to make a declaration on the relevance of the purpose criterion under their national law.

48. Concern was expressed that such compromise formulations on a crucial point might be open to different interpretations, thus defeating the very purpose of codification.

Question of the legal distinction between, on the one hand, the State and, on the other hand, State enterprises or other separate entities having distinct legal personality

(article 10, paragraph 3)

49. The approach to this issue reflected in the draft articles as adopted by the International Law Commission was endorsed by some representatives.

50. Another approach, based on a proposal (see annex, proposal L) which sought to address the question either in Part II (General principles) or in a saving clause to appear in Part IV, was suggested by the Chairman (see annex, proposal M). It consisted in including in the present text of article 5 two new paragraphs, the first of which (paragraph 2) was intended to replace paragraph 3 of article 10, while the second (paragraph 3) would provide for the possible liability of the State as a guarantor of the State enterprise or other entity.

51. Regarding paragraph 1 of the Chairman's text, which reproduced without change the ILC text, it was suggested that the phrase "subject to the provisions of the present articles" be replaced by "unless otherwise provided by the draft articles", to make it clear that the principle of State immunity derived from general international law rather than from the future convention. The suggestion was furthermore made to add the phrase "and the relevant rules of international law" at the end of the paragraph to ensure that the future instrument would not prejudice the progressive development of international law in this area.

52. Paragraph 2 of the Chairman's text laid down the principle of the separation between State and State-established entities meeting certain criteria. It provided that jurisdiction should not be exercised over a State and its property by the courts of another State in respect of a commercial transaction engaged in by a State enterprise or another State-established entity having distinct legal personality.

53. Some delegations took the view that the paragraph would be out of place in an instrument dealing with State immunity. Several delegations furthermore reserved their position on the proposed new paragraph 2 pending further study. The paragraph was however generally well received, subject to the following observations: (a) confusion might result from the use of the term "entities" in

two different meanings in paragraph 1 of article 2 and in paragraph 2 of article 5; (b) the principle of the independent legal personality of separate State entities should be formulated so as to extend beyond the area of commercial transactions; (c) the text should make it clear that where a State entity with separate legal personality such as a regulatory, administrative or law-enforcement body performed sovereign functions it was to be equated with the State itself.

54. As regards point (a) above, the Chairman observed that the two categories of entities could be differentiated on the basis of the criteria listed in paragraph 2. On point (b), he remarked that it was mostly in the area of commercial transactions that there was a need to separate the State from other entities. As for point (c), the view was expressed that the issue should be addressed in the context of article 2.

55. Paragraph 3 of the Chairman's text was supported by a number of delegations. One of them however suggested that the concluding clause be clarified by reformulating it as follows: "or of cases where the enterprise or entity engaged in a commercial transaction was specifically authorized by the State in that particular transaction."

56. In the context of paragraph 3, reference was made to the issue of under-capitalization dealt with in paragraph 33 of last year's report and to the idea of solving the issue by requiring proper balance sheets and financial records to which the private party to the transaction would be entitled to have access. Doubts were expressed on this idea. Some delegations furthermore took the view that under-capitalization was not a problem with which the draft should concern itself, inasmuch as the credit reputation of a State enterprise was for its trading partners to check. At the same time, concern was expressed that a State, knowing that a judgement was about to be obtained against a State enterprise and anxious to protect its assets, might withdraw the capital of the State enterprise. In order to protect the judgement creditor against that eventuality, the suggestion was made to provide in paragraph 3 that the principle of the separation between the State and the State enterprise or other entity should not apply when adhering to it would result in fraud or injustice (see annex, proposal N).

57. Some representatives, while expressing support for the proposal, felt that the notions of fraud and injustice were unclear and should be replaced by a more objective criterion. The proposal furthermore gave rise to objections for the following reasons: (a) the reference to fraud or injustice conveyed the unfortunate message that State enterprises were engaged in less than respectable business; (b) any manipulation of a State enterprise by the State itself would fall within the purview of State responsibility; (c) the reference to liability of the State "under the internal law of the forum State" unduly restricted the discretion of the forum court.

Additional new paragraphs prepared for insertion in the new version of article 5 as proposed by the Chairman

58. It was proposed to make it clear in a separate paragraph that where a court exercised jurisdiction over the State itself, a State enterprise or State entity not party to the underlying transaction should remain outside the proceedings (see annex, proposal O). In reply to the remark that this proposal was unclear in the absence of a definition of a State enterprise or other entity, attention was drawn to the criteria listed in paragraph 2 of the Chairman's proposal (see annex, proposal M): those entities which met the criteria in question would not be considered as falling within the definition of a State. It was suggested that this point be made clear in article 2.

59. Some delegations took the view that the proposed new paragraph would be out of place in an instrument dealing with State immunity. Other representatives, without denying the theoretical validity of this position, noted that, in practice, there was a risk that where a foreign court entered a judgement against a State that did not have property available for the execution of the judgement in the forum State, it might look for other available property, including the property of a separate State entity with no relation to the underlying claim. In their opinion, although the problem appeared to be implicitly covered by the principle of the separation between the State and State enterprises or other entities set forth in paragraph 2, it would be better to expressly address it in order to avoid difficulties of interpretation.

60. A further additional paragraph was proposed for inclusion in article 5 (see annex, proposal P). It provided that when a court exercised jurisdiction with respect to a commercial transaction concluded by a constituent unit of a federal State, the federal State as a whole should remain outside the proceedings.

61. Some delegations questioned the appropriateness of singling out the various components of the definition of a State (namely, constituent units of federal States) and providing for a special regime for that particular component. The remark was made that the problem of the possible imposition of measures of constraint on a State further to a claim relating to a transaction entered into by one of its constituent elements could also arise in non-federated States. The issue was viewed as very complex because of the diversity of the constitutional orders of States.

Article 11. Contracts of employment

62. A view was expressed that article 11 should be eliminated and the problems related to contracts of employment left to diplomatic negotiations. On the other hand, a number of delegations expressed concern that the rule in paragraph 1, according to which immunity cannot be invoked in proceedings related to contracts of employment, was undermined by the numerous exceptions listed in paragraph 2.

63. While subparagraph (a) was viewed by some delegations as too broadly formulated, the proposal to restrict the scope of the text by referring to diplomatic staff and consular officers as defined in the respective Vienna Conventions (see annex, proposal Q) drew some criticism on the ground, first,

that the permanent missions to international organizations or trade missions would be left out; second, that the members of the technical or administrative staff might perform functions closely related to the exercise of governmental authority or national security matters; and third, that States could conceivably employ non-diplomatic staff with special expertise, for example, in military matters, to perform functions relating to national security.

64. As regards subparagraph (b), it was recalled that at the previous session the Chairman had proposed (see A/C.6/47/L.10, para. 29) that it be made clear that a State could invoke immunity from jurisdiction of the court of the forum State in respect of the recruitment of an individual but not in respect of monetary compensation for wrongful dismissal. Several members supported the proposal, which they viewed as consistent with the intention of the ILC as reflected in paragraph (10) of the commentary to the article. Attention was however drawn to the difficulty involved in establishing that the dismissal was wrongful. Questions were further raised as to the extent to which the forum State courts might inquire into areas involving security considerations, or should be given jurisdiction over cases of wrongful dismissal arising, for instance, from a governmental decision to reduce the size of a diplomatic mission.

65. In the light of the discussion, the Chairman proposed to reformulate subparagraph (b) as follows:

> "the purpose of the claim is to obtain the recruitment, renewal of employment or reinstatement of an individual;".

66. As for subparagraphs (c) and (d), concern was expressed that they were too restrictive and might be at variance with the public policy of certain States. It was pointed out, in particular, that subparagraph (c) left nationals of third States without any legal protection and might conflict with the non-discrimination provision of treaties such as the EEC Treaty. As for subparagraph (d), the remark was made that it would not permit an employee who was a national but not a permanent resident of the employer State at the time when the proceedings were instituted to bring an action in the court of the forum State. Proposals aimed at meeting those concerns were presented (see annex, proposal R) but not insisted upon.

Article 18. State immunity from measures of constraint

67. The debate confirmed that approaches to this question varied widely: under one country's case-law, the immunity from measures of constraint was coterminous with immunity from jurisdiction, while in other countries, particularly developing countries, consent to the exercise of jurisdiction did not necessarily imply consent to the taking of measures of constraint.

68. In support of the first approach, it was stated that execution of final judgements should not be so difficult as to render a regime of limited immunity ineffectual in practice.

69. In support of the second approach, the remark was made that immunity from measures of constraint was a principle recognized in the theory of international

law and consecrated by practice and that, as pointed out in the ILC commentary to article 18, no sovereign State could exercise its sovereign power against another equally sovereign State.

70. Comments focused on the requirement, provided for in paragraph 1 (c) of the ILC text, of a connection with the claim in the attachment of State property.

71. Some delegations observed that this requirement was not rare in international practice and domestic legislation, and reference was made in this context to articles 23 and 26 of the European Convention on State Immunity, 2/ and section 1610, subsection (a), paragraph (2), of the United States Foreign Sovereign Immunities Act. 3/ The relevant case-law, it was added, pointed in the same direction.

72. Other delegations were of the view that, once final judgement was given, the State should be treated like a private party for purposes of execution. In their opinion, the connection requirement was unduly restrictive, particularly since many contractual disputes or delictual claims might have no connection with any property at all. In the opinion of those delegations, the two other conditions stipulated in paragraph 1 (c), namely that the property be intended for other than government non-commercial purposes and be located in the forum State, provided adequate safety for State property against measures of execution.

73. The delegations referred to in paragraph 71 above, however, disagreed with this view. They argued: (a) that the draft articles did not define the term "State property" and left the matter to the discretion of domestic courts, which might have little experience of international law and international practice; (b) that the risk of wrongful application of the articles was aggravated by the complexity of the definition of the term "State"; (c) that the phrase "other than government non-commercial purposes" left certain kinds of property in a grey zone; (d) that it was unclear to what extent the property of agencies and instrumentalities of the State, which were considered as falling within the definition of a State when they acted in the exercise of the prerogatives of governmental authority, was deemed to be State property in respect of which measures of constraint could be taken; and (e) that States could not be equated with private parties as far as satisfaction of a judgement was concerned and that such measures of constraint would give rise to serious international frictions, particularly if taken at the pre-judgement stage.

74. It was recalled that in order to bridge those differences of views, the Chairman had, at the previous session (A/C.6/47/L.10, para. 21), proposed to eliminate the requirement of a link between the claim and the property except in the case of pre-judgement measures.

75. The divergences of opinion reflected in paragraphs 67 to 73 above resurfaced in the discussion of the Chairman's proposal.

76. It was suggested that the whole question be re-examined, taking into account the various types of claims envisaged in part III of the draft articles and in the light of the detailed regime provided for in the European Convention on State Immunity.

77. The new paragraph proposed by the Chairman for insertion in article 18 (see A/C.6/47/L.10, para. 23) gave rise to reservations on the ground that under domestic legislation any party to judicial proceedings was given the time necessary to comply with the judgement and that there was no reason to provide for special rules in the case of States. Some delegations however supported the proposed addition, subject to improvements being made in its wording. The phrase "adequate opportunity to comply with the judgement" was viewed as vague and it was suggested that a time-limit be set, for instance two months. In reply, the remark was made that it would be for the courts to determine what was an adequate notice and that the setting of time-limits might encroach on the discretionary power of the court.

78. In the light of the discussion, the Chairman amended the proposed new paragraph to read:

> "No measures of constraint shall be taken against the property of a State before that State is given adequate opportunity to comply with the judgement."

79. As regards the suggestion to spell out the obligation of States to satisfy a valid judgement (see A/C.6/47/L.10, para. 25), the idea behind it was generally viewed as unobjectionable, but doubts were expressed on the desirability of an express provision on the subject.

80. Some members felt that it would be useful to deal with the question of enforcement of judgements in third States, possibly along the lines of the European Convention on State Immunity. Others cautioned against addressing a complex subject which was extensively dealt with in existing agreements.

Article 19. Specific categories of property

81. Some members viewed the article as providing useful indications as to the meaning of the phrase "property specifically in use or intended for use by the State for other than government non-commercial purposes". Others felt that a non-exhaustive list was of dubious usefulness and could even be dangerous, in that it created a negative presumption with regard to property not included therein.

82. As regards subparagraph (a) of paragraph 1, the suggestion that a distinction be made between the funds held in the accounts concerned depending on whether they related to commercial activities or not gave rise to different views. Other comments included: (a) the remark that the phrase "property of a military character" in subparagraph (b) should be replaced by "property owned or controlled by the armed forces of a State"; (b) the observation that in subparagraph (c) the word "property" should be qualified through the addition of the phrase "used for monetary purposes" or "held by a central bank or monetary authority for its own account"; and (c) the remark that in subparagraphs (d) and (e) the provision concerning the sale of property should apply to all categories of property.

Other issues

83. It was proposed to make the rule on non-retroactivity of the articles (contained in article 4) applicable to any event on which jurisdictional immunity depended, which had taken place prior to the entry into force of the convention (see annex, proposal S). Reference was made in this context to paragraph 2 (b) of article 10, under which the parties to a commercial transaction could agree that paragraph 1 would not apply to the transaction. The reaching of such an agreement was, it was observed, an event on which the applicability of immunity depended, and the proposed addition was intended to bring such events within the ambit of article 4.

84. The proposal did not give rise to substantive objections and was supported by several delegations, on the understanding, however, that it would have to be reverted to once all articles had been worked out and its implications in relation to the draft as a whole could be assessed. Some delegations reserved their positions pending further study. One of them expressed doubts as to whether the proposed addition was really necessary in view of the use by the ILC of the broad formula "any question of jurisdictional immunities of States".

85. The question whether the draft articles should contain provisions on aircraft and space objects (see A/C.6/47/L.10, para. 35) was answered in the negative by some delegations, which observed that this complex subject was governed by existing agreements and long-standing practice, and in the affirmative by others, which felt that the draft would be incomplete if it did not specifically address questions relating to the immunity of aircraft or space objects owned or operated by a State, including issues arising out of the sale, repair or detention of State aircraft.

86. It was suggested that the principles laid down in article 16 for warships and other ships owned or operated by a State could be extended to State aircraft and space objects, on the understanding that claims against the State relating to aircraft or space objects that would be permissible under other provisions of part III, notably those relating to commercial transactions or personal injuries and property damage, would not ipso facto be excluded.

87. In the light of the suggestion made by a number of Governments in their written comments and endorsed by several delegations at the previous session (A/C.6/47/L.10, para. 36), and taking into account a specific proposal on the matter (ibid., annex II), the Working Group considered the question of whether the draft articles should be accompanied with a dispute settlement mechanism. While there was a view that States should rely on the various types of procedures listed in Article 33 of the Charter, some members felt that the future convention would be more effective if it contained a set of dispute settlement provisions. It was suggested, however, that the drafting of such provisions be left to a diplomatic conference. It was also suggested, in opposition to the proposal for a dispute settlement mechanism, that such a mechanism would draw the forum State unnecessarily into disputes between private parties and foreign States.

88. Attention was drawn to the need to take into account the fact that the situations dealt with in the draft involved (a) disputes between private individuals and States, and (b) proceedings before the domestic courts of

another State. In this connection, concern was expressed that review of municipal court decisions at the international level would infringe upon the judicial authority and sovereignty of the State and undermine the hierarchy of the domestic judicial system. It was further suggested that the implementation of the outcome of international dispute settlement procedures would present special difficulties for States in the light of the principle of the independence of the judiciary within a State.

89. In reply to those concerns, the remark was made that the subject of the international proceedings would be the dispute between two or more States parties concerning the interpretation or application of the convention, rather than the decision of the domestic court. It was furthermore stated that, from the international law perspective, the court was part of the State, which could not invoke the provisions of its internal law as a justification for not complying with its obligations under international law, and that implementing legislation could provide some procedural mechanism for the review of national court decisions or the revision of such decisions by national courts to take account of the results of international proceedings.

90. On the types of settlement procedures to be envisaged, some members observed that a final determination of a claim should not be unduly protracted and that the private individual should be allowed to rely on the domestic court decision pending a settlement at the international level. Some members felt that a role for the International Court of Justice could be envisaged in the present context. Others took the view that non-binding procedures might be more appropriate.

91. The view was expressed that the issue of jurisdictional immunity of foreign armed forces should be dealt with bilaterally between the sending State and the host State. It was therefore suggested that the issue of jurisdictional immunity of armed forces of a State stationed in another State should be uniformly excluded from the scope of the present draft articles.

92. It was finally suggested to reintroduce in the draft the article on fiscal matters which had been deleted at the stage of the second reading.

Notes

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. II, sect. D.

2/ See Council of Europe, European Convention on State Immunity and Additional Protocol, European Treaty Series, No. 74 (Strasbourg, 1972).

3/ United States Code, 1976 Edition, vol. 8, title 28, chap. 97; text reproduced in United Nations, Materials on jurisdictional immunities of States and their Property (United Nations publication, Sales No. E/F.81.V.10), pp. 55 et seq.

Annex

PROPOSALS

Proposal A (Russian Federation)

(1) Reformulate subparagraph (b) of paragraph 1 of article 2 as follows:

"(b) 'State' means:

(i) the State and its various organs of government;

(ii) constituent units of the State to the extent that they are authorized to act on behalf of the State as a whole, or on their own behalf, provided that they have legal personality entitling them to invoke the immunity of the State;

(iii) political subdivisions of the State to the extent that they are authorized to act on behalf of the State;

(iv) government agencies of the State;

(v) representatives of the State acting in that capacity."

(2) Add a paragraph (d), reading as follows:

"(d) 'Governmental agencies of the State' means agencies, instrumentalities or other entities which are delegated by the State to perform administrative, regulatory or law-enforcement functions on behalf of the State;"

Proposal B (Australia)

Variant I

(1) Replace subparagraphs (b) (iii) and (iv) of paragraph 1 of article 2 by the following:

(iii) political subdivisions of the State;

(iv) agencies and instrumentalities of the State other than State enterprises.

(2) Add a new subparagraph (d), reading as follows:

"(d) 'State enterprise' means an agency or instrumentality of the State with separate legal personality, the principal activity or function of which is to engage in commercial transactions."

(3) Add a new paragraph to article 5, reading as follows:

"In exceptional cases where a State enterprise [or a non-government entity] is endowed with certain governmental authority to perform acts in the exercise of the sovereign authority of the State, the State enterprise or entity, when performing such acts, enjoys the same immunity in respect of itself and its property as the State, save that Part V does not apply to the enterprise or entity."

Variant II

(1) Replace subparagraphs (b) (iii) and (iv) of paragraph 1 of article 2 by the following:

"(iii) political subdivisions of the State;

(iv) governmental agencies of the State."

(2) Add a new subparagraph (d), reading as follows:

"(d) 'Governmental agency' means an agency, instrumentality or other entity of the State, whether or not endowed with separate legal personality, the principal activity of which is the performance of regulatory, administrative or law enforcement functions."

(3) Add a new paragraph to article 5, reading as follows:

"Where a State entity other than a governmental agency [, or a non-government entity,] is endowed with certain governmental authority to perform acts in the exercise of the sovereign authority of the State, that entity, when performing such acts, enjoys the same immunity in respect of itself and its property as the State, save that Part V does not apply to that entity."

Proposal C (United States)

Reformulate paragraph 2 of article 2 as follows:

"2. In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 (c), reference should be made to the nature of the contract or transaction. However, a contract or transaction shall not be considered commercial if the parties have expressly so agreed when entering into the contract or transaction."

Proposal D (Spain)

Reformulate paragraph 2 of article 2 as follows:

"2. Notwithstanding the provisions of paragraph 1 (c), a court, in determining whether a contract or transaction is a 'commercial transaction', shall take into account the purpose of the contract or transaction if, at the time of its conclusion, the State which is a party to it has expressly reserved that possibility and the other party has not expressly objected."

Proposal E (Chairman)

Reformulate paragraph 2 as follows:

"2. Notwithstanding the provisions of paragraph 1 (c) above,

(I) a contract or transaction shall not be considered a 'commercial transaction' if the parties have expressly so agreed when entering into the contract or transaction;

(II) a court, in determining whether a contract or transaction is a 'commercial transaction', shall take into account the purpose of the contract or transaction if, at the time of its conclusion, the State which is a party to it has expressly reserved that possibility, and the other party has not expressly objected."

Proposal F (France)

Reformulate paragraph 2 as follows:

Variant I

"Notwithstanding the provisions of paragraph 1 (c), the transaction shall not be considered commercial within the meaning of this convention if it is concluded for the purpose of carrying out a State mission."

Variant II

"The commercial character of a transaction shall be determined by taking into account both the nature of the contract and the purpose for which it is concluded, i.e., whether or not it relates to the carrying out of a public service mission."

Proposal G (Australia)

(1) Replace paragraph 2 of article 2 by the following:

"2. Subject to paragraphs 3 and 4 of this article, in determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 (c), reference shall be made to the nature of the contract or transaction.

"3. Notwithstanding the provisions of paragraph 1 (c), a contract or transaction shall not be considered commercial if the parties have expressly so agreed when entering into the contract or transaction.

"4. Notwithstanding the provisions of paragraph 1 (c), a court, in determining whether a contract or transaction is a 'commercial transaction' shall take into account the purpose of the contract or transaction if the parties have expressly so agreed when entering into the contract or transaction."

(2) Renumber the present paragraph 3 as paragraph 5.

Proposal H (Spain)

In proposal G, reformulate paragraph 4 as follows:

"In the absence of any express determination, purpose may also be taken into account if it is a relevant criterion to define the character of the contract or transaction in the law applicable thereto."

Proposal I (Small group composed of Australia, China, France, the Russian Federation and Spain)*

(1) Replace paragraph 2 of article 2 by the following:

"2. Subject to paragraphs 3, 4 and 5 of this article, in determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 (c), reference shall be made to the nature of the contract or transaction.

"3. Notwithstanding the provisions of paragraph 1 (c), the parties may expressly agree when entering into the contract or transaction whether or not it shall be considered a 'commercial transaction'.

"4. Notwithstanding the provisions of paragraph 1 (c), a court, in determining whether a contract or transaction is a 'commercial transaction', shall take into account the purpose of the contract or transaction if the parties have expressly so agreed when entering into the contract or transaction.

"5. Notwithstanding the provisions of paragraph 1 (c), in the absence of any express agreement of the kind referred to in paragraphs 3 or 4 of this article, a court, in determining whether a contract or transaction is a 'commercial transaction', shall take into account the purpose of the contract or transaction if it is a relevant criterion under the law of the country which is most closely connected with the contract or transaction, notwithstanding any express choice-of-law clause relating to the contract or transaction as a whole."

(2) Renumber the present paragraph 3 of article 2 as article 6.

Proposal J (Chairman)

In proposal I reformulate the latter part of paragraph 5 as follows:

"5. ... a court, in determining whether a contract or transaction is a 'commercial transaction', shall take into account its purpose provided that:

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* One of the delegations reserved its position in relation to this proposal.

(a) the purpose is a relevant criterion under the law of the State which is a party to the contract or transaction; and

(b) the other party was informed of that circumstance before the contract or transaction was concluded."

Proposal K (United Kingdom)

Delete subparagraph (b) (iv) of paragraph 1 of article 2 and insert a new article, reading as follows:

"1. For the purposes of the present articles the expression 'State' shall not include any separate legal entity of a State (other than a State's central bank or other monetary authority) which is distinct therefrom and is capable of suing or being sued.

"2. A separate entity enjoys immunity in respect of itself and its property from the jurisdiction of the courts of another State, if and only if:

"(a) the proceedings relate to acts performed by that entity in the exercise of the sovereign authority of a State; and

"(b) the circumstances are such that a State would have been so immune.

"3. If a separate entity submits to the jurisdiction of the courts of another State in proceedings in respect of which it is entitled to immunity by virtue of paragraph 2, articles 18 and 19 shall apply in respect of those proceedings as if references in those articles to a State were reference to that entity."

Proposal L (Australia)

(1) Delete paragraph 3 of article 10 and include the following new provision, as a generally applicable principle in part II, or as a savings clause in part V:

"1. Jurisdiction shall not be exercised over a State and its property by the courts of another State in respect of an act or transaction performed or entered into by a separate entity of the former State on its own behalf.

"2. Jurisdiction shall not be exercised over a separate entity of a State and its property by the courts of another State in respect of an act or transaction performed or entered into by the former State on its own behalf or by another separate entity of the former State on its own behalf.

"3. For the purposes of this article:

"(a) 'separate entity of State' means an entity of a kind referred to in article 2 (1) (b) (ii) to (iv) [whether or not it is entitled to perform acts in the exercise of the sovereign authority of the State] which:

(i) has independent legal personality;

(ii) is capable of suing and being sued in its own name; and

(iii) is capable of acquiring, owning and disposing of property;

"(b) 'State' does not include a separate entity of a State.

"4. This article is without prejudice to the independent liability of a State in cases where it acts as a guarantor of a liability of a separate entity of that State, or cases where a separate entity of a State engages in a transaction as the authorized agent of the State, rather than on the separate entity's own behalf."

Proposal M (Chairman)

Make the present text of article 5 into a paragraph 1 and insert two new paragraphs as follows:

"2. Jurisdiction shall not be exercised over a State and its property by the courts of another State in respect of a commercial transaction engaged in by a State enterprise or another entity established by the State which:

(a) has independent legal personality;

(b) is capable of suing and being sued in its own name; and

(c) is capable of acquiring, owning or possessing and disposing of property.

"3. Paragraph 2 above is without prejudice to the consideration by the courts of the liability of the State as a guarantor of the liability of the State enterprise or other entity or of cases where the enterprise or entity engaged in a transaction as an authorized agent of the State."

Proposal N (United States)

In proposal M, reformulate paragraph 3 as follows:

"3. Paragraph 2 above is without prejudice to the consideration by the courts of the liability of the State under the internal law of the forum State, including where one State acts as a guarantor of the liability of the State enterprise or other entity, in cases where the enterprise or entity engaged in a transaction as an agent of the State, or where adhering to the separate juridical status of the State enterprise or other entity would result in fraud or injustice."

Proposal O (Russian Federation)

In proposal M, add a new paragraph 2 bis, reading as follows:

"2 bis. Jurisdiction shall not be exercised by courts of the other State over a State enterprise or other entity as defined in paragraph 2 of this

article, in connection with a commercial transaction concluded by that State on its own behalf and not related to the State enterprise or entity."

Proposal P (Russian Federation)

In proposal M, add a new paragraph 2 ter, reading as follows:

"2 ter. Jurisdiction shall not be exercised by courts of another State over a federal State as a whole in connection with a commercial transaction concluded on its own behalf by a constituent unit of a federal State as defined in subparagraph (ii) of paragraph 1 (b) of article 2."*

Proposal Q (Australia)

Replace subparagraph (a) of paragraph 2 of article 11 by the following:

"(a) the employee is employed as:

(i) a member of the diplomatic staff of a mission as defined by the Vienna Convention on Diplomatic Relations; or

(ii) a consular officer as defined by the Vienna Convention on Consular Relations;"

Proposal R (Australia)

Replace subparagraphs (c) and (d) of paragraph 2 of article 11 by the following:

"(c) at the time when the contract of employment was concluded, the employee was:

(i) a national of the employer State but not an habitual resident [a permanent resident] of the State of the forum; or

(ii) an habitual resident [a permanent resident] of the employer State;

(d) at the time when the proceeding is instituted, the employee is a national of the employer State but not an habitual resident [a permanent resident] of the State of the forum;"

Proposal S (Russian Federation)

Insert the following at the end of article 4:

"and also to any event on which giving effect to the jurisdictional immunities of States and their property depends, which takes place prior to the entry into force of the present articles for the States concerned."

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* Alternatively, proposed paragraph 2 ter could be made into a separate article.